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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-164

PASADENA CITY BOARD OF EDUCATION ET AL.,
Petitioners,

v.

NANCY ANNE SPANGLER ET AL.

and

UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE THE NATIONAL EDUCATION ASSOCIATION, THE CALIFORNIA TEACHERS ASSOCIATION, AND THE PASADENA EDUCATION ASSOCIATION

PETER T. GALIANO
1705 Murchison Drive
Burlingame, California 94010
Attorney for Amicus Curiae the California Teachers Association

RALPH J. MOORE, JR.
RICHARD M. SHARP
JAMES R. BIEKE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
Attorneys for Amici Curiae

HORACE WHEATLEY
1125 West Sixth Street
Los Angeles, California 90017
Attorney for Amicus Curiae the Pasadena Education Association

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae the National Education Association

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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BRIEF OF AMICI CURIAE THE NATIONAL EDUCATION ASSOCIATION, THE CALIFORNIA TEACHERS ASSOCIATION, AND THE PASADENA EDUCATION ASSOCIATION

INTEREST OF AMICI CURIAE

Pursuant to Rule 42(2) of the Rules of this Court, this Brief is submitted, with the consent of the parties, by the National Education Association (NEA), the Cali-

fornia Teachers Association (CTA), and the Pasadena Education Association (PEA) as amici curiae. The parties' letters of consent have been filed with the Clerk of this Court.

The National Education Association is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or who is interested in advancing the cause of education. It was first organized in 1857 and was chartered in 1906 by a special act of Congress. Its statutory purpose is "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States." 34 Stat. 805. NEA presently has 1.7 million members.

A major interest and objective of NEA is to secure equality of education and sound education for children of all races. It is convinced that segregated education is not only inherently unequal, but adversely affects the quality of education afforded to all students, not least by denying them adequate preparation for living and working in a society in which they must deal with persons not of their own race. Accordingly, NEA is committed to the goal of full, effective, and permanent desegregation of all school systems in the country and to the attainment and permanent maintenance by each school district of a genuine unitary system with no trace of racial discrimination.

Reflecting these concerns, NEA has adopted a resolution providing in part:

> "The National Education Association believes it is imperative that full integration of the Nation's schools be effected.
>
> "The Association recognizes that acceptable integration plans will include affirmative action programs and a variety of devices such as geographic realignment, pairing of schools, grade pairing and satellite schools. Some arrangements may require busing of students in order to comply with established guidelines adhering to the letter and spirit of the law." (*NEA Handbook, 1974-75, for Local, State, and National Associations*, p. 259.)

In addition, NEA and its state affiliates have participated as amici curiae in numerous major proceedings in this Court involving issues of school desegregation.[1]

The California Teachers Association is a statewide professional organization of educators and is affiliated with NEA. The Pasadena Education Association is a local organization of educators in the Pasadena Unified School District and is affiliated with CTA and NEA. As affiliates of NEA, both of these associations are committed to the same goals and objectives as is NEA.

The present case raises questions concerning when a school district in which *de jure* racial segregation has been found and which is subject to an injunction and a court-ordered plan for eliminating that segregation must be granted relief from the injunction and plan and from the court's continuing jurisdiction. In light of their commitment to the goal of full and permanent desegregation, NEA, CTA, and PEA are vitally interested in the determination of those questions. In addition, these amici curiae believe that they can be of service by presenting to this Court principles and guidelines for resolving the issues here involved.

STATEMENT OF THE CASE

In January 1970 the United States District Court for the Central District of California issued a decision find-

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[1] See, *e.g.*, *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189 (1973); *School Board of the City of Richmond, Virginia* v. *State Board*, 412 U.S. 92 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

ing that the school system of the Pasadena Unified School District was *de jure* segregated by race in violation of the Fourteenth Amendment. *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (App. 3-4, 97-133).[2] The court made detailed findings of fact showing that the petitioner Board of Education, by its actions and inactions on numerous occasions for over 20 years, had contributed significantly to the racial segregation of the District's schools. *Id.* at 505-521 (App. 97-126). Specifically, those findings revealed that the Board had, among other things, drawn and changed attendance areas in a way which increased the segregation and racial identifiability of the schools; used transportation to allow white students to avoid attending largely black schools (including the transportation of white students past available majority-black schools to majority-white schools); discriminated on a racial basis in the hiring, assignment, and promotion of black teachers and administrators; adopted policies on the construction and rehabilitation of schools which contributed to the schools' racial identifiability; and granted racially motivated transfer requests, thereby increasing the segregation. As a remedy for this *de jure* segregation, the court enjoined the Board from discriminating on the basis of race, ordered the Board to prepare a plan to correct the racial segregation in the school district, and ordered that such plan must, among other things, "provide for student assignments in such a manner that, by or before the beginning of the school year that commences in September of 1970 there shall be no school in the District . . . with a majority of any minority students." *Id.* at 505 (App. 3-4).

In response to the court's directive, the School Board submitted its proposed plan. With respect to elementary schools, the plan divided the school district into four relatively ethnically balanced areas and established stu-

[2] Citations to "App." refer to the Joint Appendix in this case.

dent attendance zones within each area in such a way that by the first day of the 1970-71 school year there would be no "majority of any minority" in any school (App. 9-26, 60-92). According to the plan, "[e]ach year the areas will be reviewed to assure that the ethnic balance is maintained" (App. 10). Similarly, with respect to junior and senior high schools, the plan divided the district into attendance areas which were relatively ethnically balanced and would meet the court's "no majority of any minority" mandate (App. 27-34). It provided that "Junior High School boundaries may need to be changed from time to time to continue ethnic balance as established in September 1970" (App. 27). The plan also contained provisions for eliminating discrimination in the assignment, hiring, and promotion of teachers and administrators (App. 47-57). In March 1970 the district court approved the Board's plan, popularly known as the "Pasadena Plan" (App. 96).

The Board did not appeal the district court's decision and order or the court's approval of the Pasadena Plan. The plan went into effect at the beginning of the 1970-71 school year.

In January 1974 the Board moved the district court for relief from the court's order requiring desegregation and from the court's order approving the Pasadena Plan; for dissolution of the injunction that there be no majority of any minority students in any school; for termination of the court's continuing jurisdiction; and, in the alternative, for modification of the Pasadena Plan by substitution of another plan. The district court denied all these motions. 375 F. Supp. 1304 (1974) (App. 452-59). In so doing, the court found that for three of the four years since the Pasadena Plan was implemented, the school district had failed to comply with the court's injunction and the plan by having a school or schools with a black student enrollment of

over 50 percent. There was one such school in the 1971-72 school year, four in the 1972-73 year, and five in the 1973-74 year. *Id.* at 1306 (App. 454). The court stated further that the Pasadena Plan had not had the cooperation of the Board (*id.* at 1308, App. 458); that the majority of the Board were avowed opponents of the plan and its aims (and were particularly opposed to any court-ordered transportation of students) (*id.* at 1308 n.14, 1309, App. 457 n.14, 459); that the Board advocated a modified "freedom-of-choice" plan which would predictably lead to at least some resegregation (*id.* at 1307, App. 455-56); and that to grant the relief requested in these circumstances would "surely be to sign the death warrant of the Pasadena Plan and its objectives" (*id.* at 1309, App. 459). The court also rejected the Board's arguments that the Pasadena Plan should be terminated because it was the sole cause of "white flight" and because it was not succeeding educationally. *Id.* at 1306, 1308 (App. 454, 458). Finally, the court refused to allow the substitution of the Board's proposed alternative plan, because it was essentially a "freedom-of-choice" plan like those which had failed to accomplish desegregation in the past, because it would predictably cause some resegregation, and because many of its purported advantages could also be obtained under the Pasadena Plan. *Id.* at 1307-08 (App. 455-58). In announcing its decision orally, the district court stated:

> "Unfortunately, I cannot make that finding [that the school district has become unitary], because I think that from the evidence that was presented to me I find still some vestiges that would indicate that the Board has not completely made this School District a unitary school district." Quoted in the dissenting opinion below, 519 F.2d at 444 n.7 (Pet. A32 n.7) [3]

[3] Citations to "Pet." refer to the Petition for a Writ of Certiorari.

On appeal the Court of Appeals for the Ninth Circuit affirmed the district court's decision, holding, *inter alia*, that the district court did not abuse its discretion and acted reasonably in concluding that "full and effective elimination of racial discrimination" and "the contemplated disestablishment of segregation"—including the elimination of "all vestiges of *de jure* segregation"—had not been achieved in the Pasadena School District. 519 F.2d 430, 437, 438 (1975) (Pet. A10, A12). The Board now asks this Court to review and reverse that ruling.

SUMMARY OF ARGUMENT

I

Since the dissolution or modification of injunctive relief and other equitable remedies is within the broad equitable discretion of the trial court, the question in the present case is whether the district court here abused its discretion in denying the relief sought by the School Board. The decisions of this Court make clear that a district court in a school desegregation case is not required to dissolve a desegregation remedy or terminate its jurisdiction at least until the school board has shown that the state-imposed segregation has been effectively eliminated "root and branch" and a genuine unitary system has been implanted in its place. The board cannot meet that burden unless it can demonstrate that the disestablishment of segregation is complete and final and promises realistically to last.

While this Court has not had prior occasion to delineate specifically the factors and criteria that should guide the district court's determination in this regard, the Court's decisions suggest what the relevant criteria should be.

First, the district court may refuse to dissolve the desegregation remedy if sufficient time has not passed

to enable the court to evaluate the remedy in operation and to make an informed determination as to whether the officially imposed segregation and all its vestiges have been fully and finally eliminated. Thus, a school district cannot attain unitary status in an instant; a reasonable implementation period, whose length will vary with the circumstances of the particular case, is necessary.

Second, the district court may deny relief if the school board has not shown that it has fully complied with the desegregation injunction and plan in effect. That showing must include a demonstration of compliance not only with the student assignment provisions of the plan, but also with any provisions regarding faculty, staff, transportation, extracurricular activities, and facilities. In this connection, the board cannot justify a failure to comply on the ground that the remedy was invalid, when the board did not appeal that remedy or move the district court for modification.

Third, even if the board has shown compliance with the desegregation remedy, it should also be required to show that that remedy has in fact proved to be effective to achieve its goal of completely disestablishing the state-imposed segregation and all its vestiges.

Finally, since the officially imposed segregation cannot have been fully and effectively disestablished until it is reasonably certain that desegregation will survive without the court's supervision, the court may refuse to dissolve a desegregation remedy if the board has failed to establish a sufficient basis for the court to be confident that the board will continue to maintain a fully desegregated system after dissolution. This determination as to confidence will depend on the circumstances of the case. Relevant factors should include whether the board has cooperated in implementing the desegregation remedy, whether the board is committed or

opposed to affirmative measures (including any necessary student transportation) to achieve and maintain desegregation, and whether the board is planning, upon dissolution of the remedy, to take any action that would lead to an increase in racial separation in or racial identifiability of its schools. As to the last factor, if the court finds that the board is contemplating such action, the board should be required to demonstrate to the court's satisfaction both that the proposed action is not motivated by any segregative purpose and that the effect of that action would not be to impair the complete disestablishment of officially imposed segregation by recreating, or permitting the reemergence of, the effects of that segregation.

II

In the present case, the record supports the conclusion that the School Board did not meet its burden in the above respects, and hence the district court did not abuse its discretion in denying the relief sought.

Contrary to the Board's contention, the Pasadena School District did not instantaneously achieve a genuine unitary status upon institution of the Pasadena Plan in the 1970-71 school year. That initial implementation did not provide the district court with sufficient time to evaluate the plan in operation, to determine whether all vestiges of the past intentional segregation were eliminated, or to gain any reasonable basis for confidence in the continued and lasting maintenance of desegregation in the District.

Moreover, the district court was justified in finding that the Board had not shown that unitary status had been attained and maintained at the time of the Board's motions. In this regard, the district court found that the Board had not shown compliance with the Pasadena Plan, because in three of the four years since the Plan went into effect there were schools in the District with a

majority enrollment of minority students. The original "no majority of any minority" injunction, of course, was not appealed and hence is not subject to attack here. In any event, that requirement did not compel, as a matter of substantive constitutional right, any particular degree of racial balance in any school. Rather, as a remedial measure, it established a maximum limitation below which variations in racial composition were permissible, and thus served as a valid "starting point" from which the Board was to proceed in shaping the remedial plan which it was to submit.

It may be that, as the Board claims, the subsequent deviations from that "no majority of any minority" standard were due solely to demographic changes. But those deviations nonetheless could have provided a justifiable basis for the district court's decision. The Pasadena Plan appears to have contemplated that there should be an annual review of student attendance areas and a readjustment of those areas if necessary to meet the "no majority of any minority" standard. The Board failed to make such readjustments. That failure cannot be justified on the ground that the readjustment provisions were invalid, when (a) the provisions arose from the plan prepared and submitted by the Board itself; (b) provisions for annual readjustments during the implementation period prior to full disestablishment are not precluded by this Court's decisions; and (c) the Board failed to appeal or seek modification of those provisions and instead simply failed to comply. All of these factors bear on whether the Board adequately showed that it not only had attained and maintained a unitary system, but could be trusted to continue maintenance of such a system upon dissolution of the remedy.

Even if the Pasadena Plan did not require annual readjustments, the subsequent deviations from the "no majority of any minority" standard still indicated a trend

toward racial identifiability of schools; and the court could consider that trend in determining whether the desegregation remedy ordered had proved to be effective in achieving and maintaining a fully desegregated system that promised to last.

Furthermore, even apart from student assignment, the Board failed to show compliance with the plan, and the effectiveness of the plan, in other areas (*e.g.*, regarding faculty and staff). That failure in itself justifies the district court's conclusion that the Board had not shown that a genuine unitary system had been implanted.

Finally, and in any event, the district court had a reasonable basis for concluding that the Board had not provided the court with a sufficient ground for confidence that the Board would continue to maintain a fully desegregated system after dissolution of the remedy. The record reveals that, if the relief sought had been granted, the Board would have put into effect an alternative plan predictably leading to increased racial separation in and racial identifiability of schools. The district court had a reasonable basis for finding that the Board had failed to show that the effect of that plan would not be to impair the full disestablishment of officially imposed segregation by recreating the effects of such segregation. The evidence indicated that the alternative plan would foreseeably have resulted in a substantial increase in racial separation and in reemergence of numerous racially identifiable schools, reflecting those schools' racial identifiability prior to 1970. Thus the plan would have had the impact of recreating the effects of the prior officially imposed segregation, not only by reinstating the schools' racial identities, but also by restigmatizing black students as inferior. Those students, seeing the sudden racial identifiability of their schools upon institution of

the alternative plan, could not be expected to conceive of that racial identifiability as benign and unassociated with the prior *de jure* segregation. When the court considered these effects of the alternative plan along with the Board's long history of intentional segregation and the Board members' present avowed opposition to any "forced busing," it could permissibly have concluded that the Board had not satisfied it that lasting desegregation would continue to be maintained.

We therefore urge this Court to affirm. In the alternative, if this Court should conclude that the district court did not apply the proper criteria or relied on an improper consideration, we suggest that the Court remand the case to the district court for application of the criteria contained in Part I of our Argument.

ARGUMENT

Like the granting and the scope of injunctive relief and other equitable remedies, the dissolution or modification of such remedies is within the "wide discretion" of the trial court as guided by traditional equitable principles. *System Federation* v. *Wright*, 364 U.S. 642, 648 (1961). The question in the present case, then, is whether the district court abused its equitable discretion in refusing to dissolve or modify its injunction and the court-approved Pasadena Plan and to terminate its continuing jurisdiction—or, in other words, whether the district court was *required* to grant that relief. This question of whether and upon what showing a district court must dissolve an injunction and plan designed to eliminate *de jure* school segregation and its effects, and must terminate its jurisdiction over the school district involved, is one of vital importance not only for the school board, schoolchildren, and educators of Pasadena, but also for those of every other school district

subject to such remedial orders. In this Brief, we will first set forth certain principles and guidelines which we believe should govern a district court's resolution of this question, and we will then demonstrate how those principles and guidelines apply to the present case.

I. A DISTRICT COURT IS NOT REQUIRED TO DISSOLVE ITS REMEDY FOR ELIMINATING *DE JURE* SEGREGATION WHERE THE SCHOOL BOARD HAS NOT SHOWN THAT FULL AND EFFECTIVE DESEGREGATION HAS BEEN ATTAINED AND MAINTAINED AND IS REASONABLY CERTAIN TO CONTINUE TO BE MAINTAINED AFTER DISSOLUTION.

In *Green* v. *County School Board*, 391 U.S. 430, 437-38 (1968), this Court held that school boards operating *de jure* segregated systems have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." To ensure that this duty is met, the Court concluded that "whatever plan [of desegregation] is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Id.* at 439. Similarly, in *Raney* v. *Board of Education*, 391 U.S. 443, 449 (1968), the Court stated:

> "In light of the complexities inhering in the disestablishment of state-established segregated school systems, *Brown II* contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved. We agree . . . that the district courts 'should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved.' *Kelley* v. *Altheimer*, 378 F.2d 483, 489."

These cases make clear that where a school district has been found to have been *de jure* segregated and the district court has framed a remedy to eliminate and disestablish that segregation, the court should keep that remedy in effect and retain its jurisdiction until the segregation has been effectively eliminated "root and branch" and a genuine unitary system has been implanted in its place. It follows *a fortiori* that a court cannot be required to dissolve the remedy or terminate its jurisdiction at least until the school board can show that such full and effective desegregation and the establishment of a genuine unitary, nondiscriminatory system have been attained and maintained.

Moreover, such a unitary system cannot be said to have been truly implanted until it appears with reasonable certainty that full and effective desegregation will continue to be maintained by the school board. Desegregation is not a punishment imposed on a school board for unlawful acts; it is a remedy to ensure that students' fundamental constitutional rights are secured and will continue to be protected from violation. Thus in *Green* the Court quoted from *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), that the court has "'the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*'" 391 U.S. at 438 n.4 (emphasis added). Similarly, in *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968), the Court condemned plans which would lead to "resegregation"; and in *Raney* the Court stated that district courts should retain jurisdiction until the "'goal of a desegregated, non-racially operated school system is rapidly and *finally* achieved,'" 391 U.S. at 449 (emphasis added). Accordingly, the question whether state-imposed segregation and its vestiges have been completely disestablished encompasses the question whether such disestablishment is final and promises realistically to last.[4]

In sum, where, as here, a school district that has been found to have been segregated by state action and is operating under an injunction and court-approved plan for remedying such violation seeks dissolution of that remedy, the board bears the burden of showing that the segregation and all its vestiges have been fully, effectively, and finally eliminated and replaced by a genuine unitary system that is reasonably certain to last. This Court has not had prior occasion to delineate specifically the factors and criteria that should guide the district court's determination as to whether the board has met that burden. Nevertheless, this Court's decisions suggest what the relevant criteria should be. As we now discuss, those criteria are as follows: (1) whether sufficient time has passed to enable the court to make an informed decision as to whether the segregation has been fully and finally disestablished; (2) whether the school board has fully complied with the desegregation remedy in effect; (3) whether, even if the board has so complied, that remedy has proved to be effective to disestablish the segregation and remove its vestiges; and (4) whether there is a reasonable basis for confidence that the board will continue to maintain a fully desegregated system after dissolution of the remedy.

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[4] Similar considerations apply in areas other than school desegregation. Thus, for example, in *United States* v. *Swift & Co.*, 286 U.S. 106, 116-18 (1932), the Court held that a district court should not have modified an antitrust injunction so as to weaken its restraints where the power of the companies subject thereto to restrain competition had not been finally eliminated and there was a danger that, if the injunction were so modified, those companies might well resume anticompetitive practices.

A. The Court May Refuse To Dissolve the Desegregation Remedy If Sufficient Time Has Not Passed To Permit an Informed Determination as to Whether State-Imposed Segregation and Its Vestiges Have Been Fully, Effectively, and Finally Eliminated.

Before dissolving a desegregation injunction and plan, the district court should be satisfied that enough time has elapsed to enable it to determine whether the state-imposed segregation has been fully rooted out and a genuine unitary system implanted in its place. This Court recognized this factor in *Green* when it stated that "whatever plan is adopted will require evaluation in practice" before the court should terminate its jurisdiction. 391 U.S. at 439. Likewise, in *Raney*, the Court referred to "the complexities inhering in the disestablishment of state-established segregated school systems," and it noted that district courts should retain jurisdiction to ensure that the desegregation plan "is operated in a constitutionally permissible fashion." 391 U.S. at 449. Again, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971), the Court recognized that some time must pass before a school system becomes "unitary."

It is thus highly unlikely, at best, that a school district, particularly one with a long history of racial segregation and discrimination, could achieve a genuine unitary, nondiscriminatory system in an instant or indeed in a single school year. That would not provide enough time to permit the court to evaluate the remedy in operation, to determine whether all vestiges of the *de jure* segregation have been eliminated, or to gain any reasonable confidence that the board, upon dissolution of the remedy, will maintain a fully desegregated system. As the Fifth Circuit stated in *Lemon* v. *Bossier Parish School Board*, 444 F.2d 1400, 1401 (1971), in holding that a school district could not be established as a unitary system in a

single year, "'[o]ne swallow does not make a spring.'"[5] Hence, before dissolution of a desegregation remedy, there must have been sufficient time for the court to evaluate the remedy in practice and to determine whether it has led to the attainment and maintenance of a genuine unitary system that promises to last.

The amount of time needed for the court to make the necessary determinations will, of course, vary from case to case depending on the nature and extent of the prior violations, the nature and scope of the remedy and the time frame established for its implementation, the willingness of the school board to cooperate in the full implementation of the remedy and its objectives, and the district court's degree of confidence that desegregation will be maintained in the future. The experience of the Fifth Circuit has indicated to that court that three years is a minimum for district courts therein to retain jurisdiction before determining whether a school district has achieved unitary status. *United States* v. *Texas*, 509 F.2d 192 (5th Cir. 1975); *Youngblood* v. *Board of Public Instruction*, 448 F.2d 770 (5th Cir. 1971); *Wright* v. *Board of Public Instruction*, 445 F.2d 1397 (5th Cir. 1971). Thus, the court with the most experience in school desegregation cases has confirmed the importance of allowing a sufficient implementation period to enable the

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[5] See also *United States* v. *Coffeeville Consolidated School District*, 513 F.2d 244, 247 (5th Cir. 1975). The experience of the courts indicates that racially discriminatory activities of school boards, particularly regarding black teachers, do not cease at the moment the desegregation order is implemented. See, *e.g.*, *McLaurin* v. *Columbia Municipal Separate School District*, 478 F.2d 348, 353 (5th Cir. 1973); *Baker* v. *Columbus Municipal Separate School District*, 462 F.2d 1112 (5th Cir. 1972). Indeed, in *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189, 209-10 (1973), this Court recognized that the discharge of a disproportionately large number of black teachers incident to a desegregation order establishes a *prima facie* case of racial discrimination.

court to make an informed decision about whether a lasting unitary system has been implanted.

B. The Court May Refuse To Dissolve the Desegregation Remedy If the Board Has Not Shown That It Has Complied with the Court's Injunction and the Court-Approved Plan.

In ruling on a motion to dissolve a desegregation remedy, it is obviously relevant to determine whether the school board has complied during the above-discussed implementation period with the court's injunction and the desegregation plan approved and ordered into effect by the court. It is difficult to see how the board could show that it has attained and maintained a fully desegregated system and can be trusted to continue to do so if it cannot show that it has fully complied with the remedy to eliminate the past *de jure* segregation and its effects. Hence, the board should be required to show such compliance, and the district court is entitled to rely on its failure to do so in denying relief.

In this connection, it is of prime importance that the board show compliance with the student assignment provisions of the plan. Those provisions may require, for example, a particular initial readjustment of student attendance areas in order to achieve desegregation, and the simple maintenance of those same attendance areas thereafter. Alternatively, the plan may call for annual readjustment of attendance areas during the implementation period if necessary to ensure that the schools' racial composition meets or continues during that period to meet a particular goal.[6] In any case, the board must show

[6] Such a requirement is not precluded by *Swann*, which states only that "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.*" 402 U.S. at 31-32 (emphasis added). That decision does not prohibit year-by-year adjustments during the implementation period—*i.e.*, prior to the time when the court is able to determine whether full desegregation has been attained and maintained and racial discrimination by state action effectively eliminated. A provision for such readjustments may well be justified in particular cases. For example, it may not be known initially whether the student assignment plan is practicably workable to achieve the result intended, and so the plan may provide for annual readjustments during the first few years of implementation if necessary to iron out difficulties and to ensure that desegregation is achieved. Furthermore, a plan may call for annual readjustments for a few years in order to take into account the impact of any massive "white flight" which might render the initial assignment plan ineffective to achieve complete disestablishment of the state-imposed segregation. In any event, the factual contexts in which desegregation orders may be applied are so many and varied that a district court should not be precluded from including in a remedy in a proper case a provision for annual readjustment during the implementation period.

that it has complied with such provisions of the plan.[7]

Moreover, even if the relief sought by the board relates only to the student assignment provisions of the desegregation plan, the board should also be required to show that it has complied with other provisions of the plan. In both *Green* (391 U.S. at 435) and *Swann* (402 U.S. at 18), the Court pointed out that, independent of student assignment, discriminatory school board policies regarding faculty, staff, transportation, extracurricular activities, and facilities, leading to racial identifiability of schools, were important indicia of a segregated system, and that the board's duty to convert to a desegregated unitary system included a responsibility to eliminate discrimination in these respects.[8] That responsibility can-

[7] We demonstrate below that, regardless of the validity or invalidity of such provisions, the board cannot justify its failure to comply on grounds of invalidity when it did not judicially challenge the order establishing the provisions in question—either by appeal or by requesting the district court to modify those provisions. See p. 21, *infra*.

[8] The Fifth Circuit specifically requires review of desegregation plans in terms of a "sextet of indicia—student bodies, faculty,

not be divorced from the obligation to protect the students' constitutional rights and to develop a proper and effective student assignment plan. This is particularly true with respect to faculty, for, as this Court has recognized, "racial allocation of faculty denies [students] equality of educational opportunity without regard to segregation of pupils . . . [and] renders inadequate an otherwise constitutional pupil desegregation plan . . . ." *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965).[9] Likewise, the Court in *Swann* noted the importance of school construction and abandonment policies in creating a system where the students are racially segregated; and it stated that school authorities and district courts have the responsibility to see that such policies in the future do not perpetuate or reestablish segregation, and that district courts should retain jurisdiction to ensure that these responsibilities are carried out. 402 U.S. at 21.

Thus, before finding, on a motion to dissolve a desegregation remedy, that the officially imposed segregation has been eliminated root and branch and a genuine and lasting unitary system implanted, the district court should be satisfied that the board has eliminated discrimination in the hiring and assignment of teachers and administrators and in school construction, as well as in other matters such as transportation and extracurricular activities. The board's failure to demonstrate that it has complied with the provisions of the plan dealing with those matters would justify the court's denial of the relief sought.

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staff, transportation, extracurricular activities, and facilities." *Carr* v. *Montgomery County Board of Education*, 429 F.2d 382, 384 (5th Cir. 1970); *Adams* v. *Rankin County Board of Education*, 485 F.2d 324, 325 (5th Cir. 1973).

[9] Again, in *United States* v. *Montgomery Board of Education*, 395 U.S. 225, 231-32 (1969), the Court stated that "faculty and staff desegregation [is] a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination."

The board's failure to comply with any portion of a desegregation remedy cannot be justified simply on the ground that the remedy was invalid when adopted or has been shown to have been invalid by intervening judicial decisions. If the board believed that the remedy was invalid when adopted, its proper course was to appeal therefrom. If it failed to do so (or did so and lost), it cannot justify its noncompliance on the ground that the district court acted unlawfully in initially imposing the remedy. *United States* v. *United Mine Workers*, 330 U.S. 258, 293-94 (1947); *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Similarly, if the board believes that intervening decisions have shown the remedy to be invalid, it is incumbent on the board to ask the district court for a modification of the remedy on that ground and to appeal any adverse decision. See *Walker* v. *City of Birmingham*, *supra*, at 317. If it does not do so and instead simply violates a provision of the remedial injunction or plan, that violation cannot be justified on a subsequent motion to dissolve the remedy.[10] Such noncompliance tends to undermine a claim by the board that it not only has attained and maintained a fully desegregated system, but can with confidence be trusted to continue to do so.

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[10] Were it otherwise, the mandate of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), would have become a dead letter. As the Fifth Circuit has recognized, the message of that decision and its progeny has been to implement desegregation plans now and to litigate afterwards. *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1216 (5th Cir. 1970) (en banc).

C. The Court May Refuse To Dissolve the Desegregation Remedy, Even Where the Board Has Complied Therewith, If the Board Has Not Shown That the Remedy Has in Fact Proved To Be Effective To Eliminate Officially Imposed Segregation and Its Vestiges.

Even if the Board has complied with the district court's injunction and the court-approved plan, it cannot be said that a genuine unitary system has been implanted if the remedy has not proved to be an effective one for completely disestablishing the officially imposed segregation and all its vestiges. Hence, on a motion to dissolve a desegregation remedy, the school board should be required to show that in fact the remedy has proved to be effective to accomplish its objective.[11]

It may be, for example, that after the desegregation plan has gone into effect—particularly one providing only for a single readjustment of attendance areas—significant racial separation in schools or racial identifiability of schools would remain or would shortly reemerge. In that situation, as this Court held in *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189, 210 (1973): "be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts." The board should bear the same burden here. Moreover, the racial separation or identifiability that remains or reemerges may indicate that the remedial orders and plan were ineffective tools to eliminate fully the past *de jure* segregation and all its effects. Such ineffectiveness might have

[11] That showing should include a demonstration of effectiveness on each of the "sextet of indicia" referred to above .See pp. 19-20 and n.8, *supra*.

been caused, for instance, by a mistake in the reassignment of students or faculty or a misapprehension as to the racial effect thereof,[12] or by the unintentional omission of provisions to deal with a particular aspect of the desegregation (*e.g.*, regarding faculty or facilities), or merely by the fact that the plan has proved to be unworkable in practice.[13]

Where the desegregation remedy has thus proved ineffective to achieve the goal of full and lasting desegregation, the district court may well be required, on a proper motion, to modify that remedy in such a way as to ensure that the goal is accomplished.[14] But on a motion of the school board to dissolve the court's injunction and the desegregation plan completely and to terminate the court's jurisdiction, the failure of the board to demonstrate the effectiveness of the remedy to achieve the goal justifies the court's denial of *that* relief.

[12] *Cf. Hereford* v. *Huntsville Board of Education*, 504 F.2d 857, 858-59 (5th Cir. 1974), where the court held that a previously approved desegregation plan had proved ineffective to desegregate a particular school because the number of white students that had been projected by the plan to attend that school had failed to do so.

[13] Pursuant to this Court's decisions in *Alexander* v. *Holmes County Board of Education*, *supra*, and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), *de jure* segregated school districts were required to convert to a unitary system immediately; and the district courts, particularly in the South, were simply unable adequately to review all the plans for effectiveness or to supervise the conversion process in all districts.

[14] See *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), where the Court held that where an antitrust decree could be shown to have been ineffective to accomplish the intended result, the district court had the duty, on the motion of the Government, to modify the decree so as to ensure the achievement of that result.

D. The Court May Refuse To Dissolve the Desegregation Remedy If the Board Has Not Shown That the Court Can Be Confident That a Fully Desegregated System Will Continue To Be Maintained Upon Dissolution.

As we have stated before, desegregation is not a prison term for the offending school board, to be served and then terminated. Rather, it is a remedy to ensure that the constitutional violations and all effects thereof are eliminated "root and branch" and do not reoccur. It is meant not only to undo the effects of past *de jure* segregation, but to bar like segregation and effects in the future. *Louisiana* v. *United States*, *supra*, 380 U.S. at 154; *Monroe* v. *Board of Commissioners*, *supra*, 391 U.S. at 459. Accordingly, state-imposed segregation cannot have been fully and effectively disestablished or a genuine unitary system truly implanted until it is reasonably certain that desegregation will be lasting. See pp. 14-15, *supra*. On a motion to dissolve a desegregation remedy, therefore, the school board bears the burden of satisfying the court that the court can be confident that, in the absence of the detailed regulatory remedy and the court's continuing jurisdiction, the board will not undo the desegregation but will continue maintenance of it. If the court, on a reasonable basis, finds that the board has not met that burden, it may deny relief.

The determination as to whether the board has provided the court with a sufficient basis for such confidence depends largely on the particular circumstances of the case, and the relevant factors will vary from case to case. Nevertheless, certain factors pertinent to the inquiry can be identified. For example, if the board has cooperated in implementing the court-ordered plan and has demonstrated a commitment to affirmative action to remedy segregation and a willingness to continue actively on its own to cope with recurrent racial

problems, those factors would tend to support a finding of confidence that the board will continue to maintain a desegregated system.[15] A contrary inference would arise from evidence that the board has been intransigent in implementing the remedy ordered or is opposed to affirmative measures, including any necessary student transportation, that may be required to achieve or maintain desegregation. While the board members may have a constitutional right to speak out in opposition to such measures, the court need not blind itself to those views in determining whether the board can be trusted not to engage in impermissible resegregation if left free to do so.

Another factor, which needs more extended discussion because of its particular relevance to the present case, is whether the board is planning, upon dissolution of the desegregation remedy, to take any action which would result in an increase in racial separation in its schools. If the court finds that such action is contemplated, then the board should be required to demonstrate to the court's satisfaction both that the proposed action is not motivated by any segregative or discriminatory purpose and that the effect of such action would not be to interfere with the complete disestablishment of officially imposed segregation by recreating, or permitting the reemergence of, the effects of that segregation.

This standard finds support in the decisions of this Court. As discussed above, this Court in *Keyes* recognized that a long history of intentional segregation by the board justifies imposing on the board the burden of proving that any subsequent segregation is not also the result of intentionally segregative acts. So too here

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[15] The district court in *Swann* v. *Charlotte-Mecklenburg Board of Education* relied on such factors in its final order closing the file in that case. That order, dated July 11, 1975, is attached hereto as Appendix A.

the board should be required to show first that its proposed action is not motivated by any segregative purpose; and in this regard its history of intentional segregation, its attitude toward the desegregation order, and the amount of increased racial separation that would result from the proposal are all relevant.[16]

Whatever the board shows regarding its purpose, however, the district court is justified in denying relief if the board has failed to show that the *effect* of its proposal would not be to impair full disestablishment of *de jure* segregation by recreating the effects or conditions of that segregation. In *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462 (1972), this Court held that where a school board, subsequent to a desegregation order, proposed to take new action that would have increased racial separation, it was necessary to focus, regardless of the purpose or motivation of the action, "on the *effect* of the action upon the dismantling of the dual school systems involved" (emphasis by Court). According to the Court, such a proposal "must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Id.* at 460. The Court followed this holding in *United States*

[16] Thus, for example, where the board has a long history of intentional discrimination and is presently opposed to the desegregation order in effect, and where the result of its new proposal would be to give rise to a very substantial increase in racial separation and racial identifiability of schools, the court may properly be suspicious of the board's purpose. In that situation, the court may have little reason to believe that the purpose or intent to segregate has changed simply because the board has been under a desegregation order. Hence, the court may be justified in finding that the board has failed to meet its burden of showing that the increased racial separation that would result from the proposal is not motivated by any segregative intent.

v. *Scotland Neck Board of Education*, 407 U.S. 484, 489 (1972).

Both *Wright* and *Scotland Neck* involved proposals to establish a new city school district separate from that of the county of which it had always been a part; and in both cases the Court concluded that the district courts had properly found that the proposals involved would impede the disestablishment of the *de jure* segregation. In so holding, the Court in both cases relied on the fact that the new proposals would recreate the effects of that *de jure* segregation. In *Wright*, the Court first considered the fact that, whereas the racial composition of the prior single district was 34 percent white and 66 percent black, the new city district would be 48 percent white and the new county district 72 percent black. 407 U.S. at 464. The Court then stated that, while this disparity in racial composition was not enough, standing alone, to warrant enjoining implementation of the proposal in that case, the significance of that disparity was enhanced by several factors which, when considered together with the disparity, did justify the injunction: (1) the anticipated potential for an even greater disparity if county whites fled their system while city whites returned to theirs (*id.* at 464-65); (2) the fact that the city schools were formerly all white and the county schools all black, thus indicating that the proposal would perpetuate the vestiges of the prior *de jure* segregation (*id.* at 465); and (3) the fact that since the proposal was made in reaction to the district court's desegregation order and would result in " 'nearly one-half the total number of white students in the county abandon[ing] the county schools for a substantially whiter system,' " it could restigmatize the black schoolchildren as inferior, just as did the prior *de jure* segregation, and thus cause them the same psychological harm (*id.* at 465-66). In *Scotland Neck*, the Court relied on the fact that the disparity in racial composition be-

tween the two proposed new districts would be "substantial"—with the city schools 57 percent white and the county schools in a particular adjacent section 98 percent black—and that, since the city schools were formerly all white and the county schools all black, "[t]he traditional racial identities of the schools in the area would be maintained" (407 U.S. at 490).

Similar considerations should apply where a district court finds that a school board seeking dissolution of a desegregation remedy is planning, upon dissolution, to take action that would result in some increase in racial separation. In that situation, the court should determine not only whether the board has shown that the proposal lacks any segregative purpose, but also whether the board has shown that the effect of the proposal would not be to impede or undo the disestablishment of officially imposed segregation by recreating the effects of that segregation.[17] In making the latter determination, the court should take into account factors such as were involved in *Wright* and *Scotland Neck*. Thus, for example, where the board's proposal would result in a substantial increase in racial separation and racially identifiable schools and reemergence of the traditional racial identities of those schools, its impact would plainly be to recreate the effects of the past *de jure* segregation. Moreover, where the proposal would increase racial separation at the very time that the board is freed of the desegregation order, it could have the effect of restigmatizing black schoolchildren as inferior, just as they were so stigmatized prior to that order. The black child would see only that his school, once identifiably black because of the board's intentional segregative action, is identifiably black again on account of the board's action immediately upon dissolution of the desegregation order. He would have to be a great Sophist to conceive of the present racial identifiability as benign and unassociated with the prior *de jure* segregation. In short, where the board cannot succeed in disentangling the racial effects of its new proposal from the effects of the previous intentional segregation, the district court may find that the board has failed to show that the effect of the proposal would not be to impair disestablishment and hence has failed to provide the court with a sufficient basis for confidence in the continued and lasting maintenance of a genuine unitary system.

If, after making all the above-described determinations and weighing all the appropriate factors, the district court determines that the school board has not shown that full and effective desegregation has been attained and maintained and is reasonably certain to continue, then the court is justified in refusing to dissolve its injunction and its approved plan and to terminate its continuing jurisdiction. That refusal can hardly be called an abuse of discretion.[18]

[17] We believe that Judge Wallace, dissenting in the court below, intended to set forth the same test when he stated that the board must show "first, that the plan to replace the injunction lacks any segregative intent; and second, that any segregation reasonably foreseeable upon implementation of the plan is not attributable to any past, intentionally segregative actions on its part." 519 F.2d at 446 n. 10 (Pet. A33). If the board fails to show that the effect of its proposal would not be to recreate the effects of the *de jure* segregation, then it has failed to show that the racial separation foreseeable under that proposal is, in Judge Wallace's language, "not attributable to any past, intentionally segregative actions on its part." (Contrary to Judge Wallace's opinion, however, there was, as we show on pp. 42-44, *infra*, sufficient evidence in this case upon which the district court could find that the board had not met its burden in this regard, and hence affirmance, rather than remand, was proper.) If, on the other hand, Judge Wallace meant that the board could meet its burden simply by showing that the racial separation foreseeable under the plan would not be directly traceable to or caused by a specific prior segregative act by the board, then his test would be too narrow and inconsistent with *Wright* and *Scotland Neck*.

[18] Where the court determines that the school board has met its above-described burden, it may still be appropriate for the court (1) to replace the detailed regulatory injunction and plan with a

II. THE DISTRICT COURT IN THIS CASE DID NOT ABUSE ITS DISCRETION IN DENYING THE REQUESTED RELIEF.

In the present case, the district court denied the Pasadena School Board's motions for dissolution of the court's "no majority of any minority" injunction, for relief from the Pasadena Plan, for termination of the court's continuing jurisdiction, and for modification of the Pasadena Plan. In so doing, the court found that a completely unitary system had not yet been achieved in the Pasadena School District, and the court of appeals affirmed that conclusion. We will now demonstrate that, under application of the guidelines discussed above, that conclusion is fully supported by the record, and that therefore the district court did not abuse its discretion in denying the relief sought.

A. The Pasadena School District Did Not Instantaneously Become a Fully Desegregated Unitary System on the First Day of the 1970-71 School Year.

The School Board argues that the Pasadena Plan "effected integration in one fell swoop"; that since the institution of that plan—on the first day of the 1970-71

permanent injunction requiring the board to refrain from engaging in any action which would result in the reestablishment of the former *de jure* segregation or which would tend to resegregate students or faculty, and (2) to place the case on inactive status on its docket. That is what several district courts have done after finding that a fully desegregated unitary system has been achieved and maintained. See, *e.g.*, *United States* v. *Georgia*, N.D. Ga., Civil Action No. 12,972 (July 23, 1973) (App. 248-53); *United States* v. *County School Board of Sussex County*, E.D. Va., Civil Action No. 6060-R (July 5, 1973) (App. 254-55); *United States* v. *County School Board of Richmond*, E.D. Va., Civil Action No. 224-69-R (July 5, 1973) (App. 256-57); *Lee* v. *Macon County Board of Education*, N.D. Ala., Civil Action No. 70-251-S (July 3, 1974); *United States* v. *Georgia*, S.D. Ga., Civil Action No. 3009 (February 14, 1974). See also the district court's final order in *Swann* v. *Charlotte-Mecklenburg Board of Education*, attached as Appendix A hereto.

school year—the Pasadena system has been wholly unitary and free from officially imposed segregation and its vestiges; and that it should therefore be relieved of the desegregation remedy and judicial control (Br. 14-15). As shown on pp. 16-18, *supra*, however, a district court may refuse to dissolve a desegregation remedy if sufficient time has not passed to enable the court to determine whether the state-imposed segregation has been fully and finally rooted out and replaced by a genuine unitary system that promises to last. In *Green*, *Raney*, and *Swann*, this Court recognized the importance of such a reasonable implementation period during which the district court can evaluate the desegregation plan in practice and determine whether it is operated in a constitutionally permissible fashion. See p. 16, *supra*.

It is surely reasonable to conclude in the present case that the mere initial implementation of the Pasadena Plan, or even its operation during the 1970-71 school year, was not sufficient to allow the court to make the necessary determinations. In light of the School Board's long history of intentional segregation and discrimination, more time was needed to evaluate the plan in practice, to determine whether the Board was operating the plan in a permissible way, to ensure that all vestiges of the past segregation were eliminated, and to gain confidence that the Board could be trusted to maintain a desegregated system.[19] Hence, the Pasadena School District could not have attained and maintained unitary status instantly on the first day of the 1970-71

[19] As we have stated, the Fifth Circuit has explicitly held that a single year is not sufficient to establish a school district as a unitary system; and indeed that court requires its district courts to retain jurisdiction for at least three years. See pp. 16-17, *supra*.

school year, so as to entitle the Board to dissolution of the desegregation remedy at any time thereafter.[20]

We turn, then, to the question whether the court abused its discretion in finding that the Pasadena School District had not attained and maintained genuine unitary status by the time the Board moved for dissolution of the remedy in January 1974.

B. The District Court Was Justified in Finding That the Board Had Not Shown That It Had Attained and Maintained a Fully Desegregated System by January 1974.

In deciding whether a school board has attained and maintained a desegregated system, it is of first importance, as discussed above, for the court to determine whether the board has demonstrated that it has complied with the desegregation order and plan during the implementation period. The district court here, in denying relief, found that the Board had not shown such compliance with the injunction and the Pasadena Plan, because in the 1971-72, 1972-73, and 1973-74 school years there were schools in the Pasadena School District which had a majority enrollment of minority students.

The Board does not deny the fact that these deviations from the "no majority of any minority" standard occurred or the fact that it did not readjust student attendance areas to ensure that there would be no majority of any minority. The Board argues, however, that those deviations do not preclude the School District

[20] In any event, even if it could be said that the School District did attain unitary status for a moment in September 1970, the Board did not move for dissolution of the remedy until three and a half years later, and hence the court could justifiably consider whether that unitary status had been maintained during that period, as well as whether it was reasonably certain to continue. As we show below, the record supports a negative finding on these questions.

from having achieved and maintained genuine unitary status, and hence provided no basis for the denial of the relief sought, because (a) the original "no majority of any minority" injunction was shown by *Swann* to have been an invalid order compelling "racial balance" (Br. 12-13); (b) the subsequent deviations therefrom were due solely to demographic changes and the court's decree did not require annual reassignments of students to maintain the original "racial balance" (Br. 6-7); and (c) to the extent that the court's order and the plan did require such annual reassignments, they "piled Pelion on Ossa," for that, too, was shown by *Swann* to have been invalid (Br. 13-14). These arguments are without merit.

1. *The original "no majority of any minority" injunction is not subject to attack here and in any event was valid.*

The district court's original decree requiring that by September 1970 there be no school with a majority of any minority students is not subject to attack in the present proceeding. If the Board had wanted to challenge that requirement at the time it was imposed, it should have appealed; and if it wanted to attack the requirement after *Swann*, it should have moved the district court for modification of the requirement on that ground. Indeed, the Board now admits that it does "not seek to overturn the original decree" (Br. 13).

In any event, the requirement is not an invalid "racial quota" even after *Swann*. The Board relies primarily on the following statement from *Swann*:

> "If we were to read the holding of the District Court to require, *as a matter of substantive constitutional right*, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U.S. at 24 (emphasis added).

In that passage, of course, as the Ninth Circuit has pointed out, "the Court was speaking only of the proof necessary to establish the existence of the constitutional violation that is a prerequisite to any judicial remedy at all." *Kelly* v. *Guinn*, 456 F.2d 100, 109-110 (1972). Once a constitutional violation is found, the district court has the duty and the discretion to formulate a remedy broad enough to eliminate the officially imposed segregation and all its vestiges. In that regard, the Court in *Swann* held specifically that the use of mathematical ratios is a valid "starting point" in the process of shaping a remedy. 402 U.S. at 25. In the companion case of *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971), the Court expressed that view as follows:

> "As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." [21]

Similarly here, the district court's "no majority of any minority" requirement served as a "starting point" from which the Board was to proceed in shaping the remedial plan which it was to submit. It did not impose an inflexible racial ratio or compel a particular degree of racial balance, but rather established a maximum limitation on racial separation below which variations in racial composition were permissible. As the Ninth Circuit

[21] This Court expressly approved a racial ratio as a remedial measure for faculty segregation in *United States* v. *Montgomery Board of Education*, 395 U.S. 225 (1969).

stated regarding a similar injunction in *Kelly* v. *Guinn*, *supra*, at 110:

> "The court did not impose a fixed racial ratio upon classes in the school system—some classes might have 45 per cent black students, some 15 per cent, some none. The 50 per cent figure is a ceiling for black enrollment imposed for the purpose of compelling a real beginning toward eliminating the effects of past segregative practices."

Since the district court's order requiring the initial attainment of the "no majority of any minority" standard thus did not require any fixed racial ratio or balance in any particular school, it clearly was not an impermissible measure under any reading of *Swann*. Rather, it "was within the equitable remedial discretion of the District Court" (402 U.S. at 25), as a "reasonable method" for formulating "an effective remedy" (402 U.S. at 46).

2. *The Board's arguments that the Pasadena Plan did not require annual readjustments and was invalid if it did should be rejected.*

The district court's injunction ordered the Board to submit a plan to ensure that "by or before the school year that commences in September of 1970" no school would have a majority of any minority students. Thus, the language of this order on its face simply called for a single initial reassignment of students so that the standard was met in September 1970, and did not require annual reassignments thereafter in order to maintain that standard. The Pasadena Plan, however, which was prepared and submitted by the Board and approved by the district court, provided that, as to elementary schools, "[e]ach year the [four ethnically balanced] areas will be reviewed to assure that the ethnic balance is maintained" (App. 10), and that, as to junior high schools, the attendance "boundaries may need to be changed from time to time to continue ethnic balance as established in Sep-

tember 1970" (App. 27). Thus, it appears that the plan contemplated that, while it was in effect, there should be an annual review of student attendance areas—at least for elementary and junior high schools—and a readjustment of those areas if necessary to meet the "no majority of any minority" standard.[22] Indeed, that is how the district court interpreted the plan.[23]

The Board's present contention that such a requirement was invalid under *Swann* should be rejected for several reasons. First, it must be remembered that the annual readjustment provisions did not arise from the court's injunctive order, but from the plan prepared and submitted by the Board itself. Regardless of whether the Board is correct that *Swann* precludes a court from requiring a school board to make year-by-year adjustments in the racial composition of student bodies, that decision obviously does not preclude the board itself from voluntarily adopting a plan so providing. Nor does it preclude the court from approving such a provision as part of a valid desegregation plan. Where, as here, the board has adopted such a provision in its plan and has obtained court approval of that plan, the board's failure to fulfill its plan—even if the provision involved is not required by the court—bears on the question whether the board has provided the court with a sufficient basis for confi-

[22] The schools which in the 1970-71, 1971-72, and 1972-73 school years had a majority enrollment of black students were either elementary or both elementary and junior high. See 375 F.Supp. at 1306 (App. 454).

[23] In hearings on the Board's present motions, the district judge stated from the bench:

> "I can assure you that I studied this plan and I knew the plan. I knew what I thought it was going to accomplish. And I thought that it was going to accomplish, if executed in good faith, that Pasadena would never be back in this courtroom again. Now, that [accomplishment of the plan] meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena." (App. 270.)

dence that the board will continue maintenance of a fully desegregated system. The court here was thus justified in relying on such noncompliance in resolving that question.

Second, even if the annual readjustment provisions had been required by the court, such provisions, as applied to this case, are not precluded by *Swann*. Regardless of what the district judge said from the bench, the only annual readjustment requirements involved here—*i.e.*, the only ones that the Board failed to comply with—relate to readjustments during the implementation period that occurred before the court could determine whether or not a genuine unitary system had been attained and maintained. As shown above, *Swann* refers only to year-by-year adjustments "once the affirmative duty to desegregate has been accomplished" (402 U.S. at 32), and a provision for annual readjustments prior to that time is not precluded thereby and indeed could be warranted by legitimate and important reasons. See n.6, pp. 18-19, *supra*.[24]

Finally, even if the annual readjustment provisions of the plan were unlawful when adopted or were shown to be invalid by *Swann*, the Board's proper course of action was to appeal the initial decision or to request the dis-

[24] The district judge's remark that he interpreted the plan to require that there be no majority of any minority "at least during my lifetime" does not negate the validity of this argument. The only violations of the annual readjustment provisions that are involved here occurred during the implementation period, and the judge's remark did not affect that fact. Moreover, the court of appeals clearly and specifically disapproved the district judge's interpretation as applied to readjustments "after the court has determined that its plan has been effectively implemented and racial discrimination eliminated from the system . . . ." 519 F.2d at 438 (Pet. A11). Since that disapproval is not at issue here, this Court has no occasion to decide whether the district judge's interpretation as applied after a unitary system has been attained and maintained was inconsistent with *Swann*.

trict court to modify the plan on account of the intervening *Swann* decision. Yet the Board did not appeal the court's original decree or its approval of the Pasadena Plan, nor did it seek modification thereof or request leave to dispense with the annual readjustments. Instead, the Board simply failed to comply with those readjustment provisions. Whether the plan was valid or invalid, the Board's failure to comply, rather than following established procedures for challenge, was unwarranted. See p. 21, *supra*. It thus provided a permissible basis for the court to find that the Board had failed to show that it not only had attained and maintained a desegregated system, but could, with confidence, be trusted to continue maintenance of full desegregation without the court's continuing jurisdiction.

3. ***If the plan did not require annual readjustments, the fact that in three years there were schools with a majority of a minority was relevant to the plan's effectiveness.***

Even if the Pasadena Plan is read as not requiring annual readjustments to maintain the "no majority of any minority" standard, the deviations from that standard that occurred after the plan went into effect were nonetheless relevant on the issue whether a unitary system had been implanted. As demonstrated on pp. 22-23, *supra*, a district court is justified in refusing to dissolve a desegregation remedy if the board has not shown that in fact that remedy has proved to be an effective one to eliminate fully and permanently the officially imposed segregation and its effects. Here the Board claims that the deviations from the "no majority of any minority" standard were due solely to demographic changes. But however that may be, those deviations indicated a trend toward the reestablishment of racially identifiable schools. If the plan did not provide for annual readjustments, the court could certainly consider whether, in light of

that trend, the plan had been effective in achieving and maintaining a fully desegregated system that promised to last. Thus, regardless of whether the Board had complied with the student assignment provisions of the plan, the increase in racial identifiability caused by the presence of schools with a majority of a minority was a factor upon which the court could reasonably have relied in concluding that the Board had failed to show that the Pasadena School District was completely unitary.[25]

4. ***The Board failed to show compliance with the plan and effectiveness of the plan in areas other than student assignment.***

As we have demonstrated, it cannot be said that a truly unitary system has been implanted if the board has failed to comply with portions of the desegregation plan regarding faculty, staff, transportation, extracurricular activities, or facilities, or if the plan has not proved to be effective to eliminate the segregation and its effects in those areas. See pp. 19-20, 22-23, *supra*. Accordingly, even if the relief sought by the school board pertains only to student assignment, the board bears the burden of showing that it has complied with portions of the plan dealing with those other matters and that the plan has proved effective in all those other areas.

In the present case, the Board failed to provide such evidence and hence failed to meet its burden. To the contrary, there was evidence that the Board had violated the portions of the Pasadena Plan dealing with the selection and appointment of administrators (App. 264-65, 514-18, 606-07). Indeed, in a subsequent proceeding, the district court found that there were such violations and held the

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[25] It may be that this determination as to the effectiveness of the plan, if deemed crucial here, is more appropriately made upon a remand to the district court for application of the proper criteria and guidelines.

Board in contempt.[26] In any event, the record plainly demonstrates that the Board did not meet its burden of showing that it had complied with *all* provisions of the desegregation plan and that it had in fact disestablished *de jure* segregation and its effects in *all* the crucial areas.

C. The District Court Had a Reasonable Basis for Concluding That the Board Had Not Shown That a Fully Desegregated System Would Continue To Be Maintained After Dissolution of the Remedy.

Even if this Court concludes that the district court could not properly have found that the Board failed to show compliance with the desegregation plan and the plan's effectiveness to achieve and maintain desegregation, the Court should nonetheless affirm the district court's decision. As we have demonstrated, a genuine unitary system cannot be said to be implanted—and a district court may thus refuse to dissolve a desegregation remedy and to terminate its jurisdiction—if the school board has not established a sufficient basis for confidence that desegregation will be lasting, *i.e.*, that the board can be trusted, upon dissolution, to continue to maintain a fully desegregated system. See pp. 14-15, 24-29, *supra*. The district court here had reasonable grounds for finding that the Pasadena School Board had not met that burden.

The Board moved in the alternative for modification of the Pasadena Plan so as to allow substitution of an alternative plan. The court denied that motion, finding that the alternative plan was a "freedom-of-choice" plan and, if implemented, would result in "a large number of predictably racially imbalanced schools," including eight with over 60 percent black enrollment. 375 F. Supp. at 1307 (App. 455). Similarly, because of the avowed aim of a majority of the Board to return to neighborhood schools and to stop "forced busing" and the advocacy by

[26] A copy of that decision is attached hereto as Appendix B. The decision is now on appeal to the Ninth Circuit (No. 74-2530).

that majority of the alternative plan, there was certainly a reasonable basis for the court to conclude that complete dissolution of the injunction and Pasadena Plan and termination of the court's jurisdiction would have led to the implementation at least of the alternative plan and possibly of a plan that would increase racial separation even more.

The Board does not contest the fact that if the relief sought had been granted, it would have implemented its alternative plan. Nor does it seriously dispute the findings that that plan is essentially a freedom-of-choice plan and would predictably result in a significant increase in racial separation and racially identifiable schools. Indeed, the evidence fully supports those findings.[27] Thus, it is clear that in actual fact the court was presented on the Board's motion with a choice between the Pasadena Plan and a plan that would result in increased racial separation. We submit that the court did not abuse its discretion in refusing to allow the latter.

As the Board contends, this Court's decision in *Green* did not outlaw all freedom-of-choice plans (Br. 22). But that cannot negate the fact that the plan which the Board would implement upon dissolution of the present remedy would allow and would predictably result in an increase in racial separation. In such a case, as shown

[27] The essential feature of the plan is the parent's freedom of choice to pick a school from among several (six to eight depending on the area) (375 F. Supp. at 1310, App. 462). Moreover, the plan gives priority to students living in the neighborhood of a school (App. 479); and if choices were made on a neighborhood basis, many schools would plainly be racially identifiable (App. 329; see p. 42, n. 28, *infra*). The plan itself recognizes that "the ethnic balance at some sites may be altered from what it is at present" (375 F. Supp. at 1310, App. 462), and it specifically contemplates the situation where a school's "ethnic profile . . . deviate[s] significantly from the District-wide ethnic profile" (*id.*). Finally, the President of the Board testified that he could not say that the plan would result in a school district "in which there might not be any racially identifiable schools" (App. 503).

above, the Board was required to demonstrate not only that its alternative plan was not motivated by any segregative purpose, but that the effect of that plan would not be to impair or undo the disestablishment of the former officially imposed segregation by recreating, or permitting reemergence of, the effects of that segregation. The district court had a reasonable basis for concluding that the Board had not met that burden.

As in *United States* v. *Scotland Neck Board of Education*, *supra*, the disparity in the District schools' racial composition that would predictably result under the alternative plan would be "substantial," and the "traditional racial identities of the schools in the area would be maintained" (407 U.S. at 490). The district court found that, under that plan, at least eight schools would initially be over 60 percent black (whereas the District as a whole was only 40 percent black), and those eight schools were all racially identifiable black schools prior to the 1970 decree (App. 141-45). Moreover, the evidence indicated that if school choices under the alternative plan were made on a neighborhood basis—as seems in large measure likely, particularly by white students and in light of the preference to be given to students living in the neighborhood of a school (App. 479)—at least 20 of 25 elementary schools in the District would plainly be racially identifiable, reflecting their racial identifiability prior to 1970.[28] This substantial increase in racial separation in

[28] An exhibit submitted by the Government in the 1974 proceedings shows these schools' racial composition if students attended the schools in their own neighborhoods (App. 329). That exhibit reveals that seven of these schools would be over 85 percent white (and less than 5 percent black), another five of them over 70 percent white (and less than 10 percent black), and another 66 percent white (and 1.7 percent black), and that four such schools would be over 80 percent black and another three of them over 70 percent black. A 1970 exhibit showing the racial composition of the schools in the 1966, 1967, and 1968 school years reveals that these schools' racial identifiability was the same in those years (App. 141-45).

and racial identifiability of schools, accompanied by the reemergence of the pre-1970 racial identities of the schools, demonstrates that the alternative plan would have the impact of recreating the effects of the prior officially imposed segregation. As in *Scotland Neck*, therefore, the district court here had a justifiable basis for finding that the effect of the Board's alternative plan would be to impair the complete disestablishment of segregation.[29]

Moreover, other factors are present here—as they were in *Wright* v. *Council of the City of Emporia*, *supra*—which would further support the same conclusion. Not only would the Board's alternative plan predictably lead to increased racial separation and to the reemergence of formerly racially identifiable schools, but that effect could be intensified if white parents who had previously fled the system as a reaction to the Pasadena Plan would return and send their children to schools in their generally white neighborhoods. Furthermore, if, as expected, the Board put its alternative plan into effect immediately upon dissolution of the desegregation order, and if, as also expected, large numbers of white students would abandon the presently integrated schools for the predominantly white schools in their own neighborhoods,

[29] Furthermore, in the circumstances of this case, the substantial increase in racial separation and racial identifiability that would result from the Board's plan gave the district court sufficient cause to question seriously the Board's claim that that increase was not motivated by any segregative purpose. See p. 26, n. 16, *supra*. In light of the Board's long history of intentional racial segregation and discrimination and its present avowed opposition to the plan which it had submitted and the court had approved, the district court may justifiably have found that the Board had failed to meet its burden of showing that the substantially increased racial separation that would arise under its alternative plan was not motivated by any segregative intent. Perhaps, however, if a determination on this question is considered crucial to this Court's decision, the appropriate course may be to remand the case to the district court for application of the proper standards.

the effect would be the restigmatization of black students as inferior, with the consequent psychological harm. It would be too much to ask these students to believe that the sudden racial effect of the Board's new action was benign and unassociated with the prior *de jure* segregation. Thus, the district court could rationally conclude that the Board's action would recreate the effects of the officially imposed segregation and hence would impair the disestablishment of such segregation and the continued maintenance of a unitary system.

In any event, in addition to the effect of the Board's alternative plan, the fact that a majority of Board members were openly opposed to "forced busing" was relevant to whether the court could have confidence that a desegregated system would continue to be maintained. It seems clear in light of the demographic makeup and patterns in the Pasadena School District that some busing (even if not the amount required by the Pasadena Plan) would be necessary and could lawfully be required as a remedy to eliminate the officially imposed segregation and its effects. While the Board members may well have had the right to speak out against such busing and to run for office and be elected on that platform, their avowed opposition to any forced busing indicates that they would act on that view if given the chance; and the court had every reason to take that indication into account in making its determination as to confidence. When the court considered this factor together with the Board's history of intentional segregation and the foreseeable effect of the alternative plan, it could permissibly conclude that the Board had not established a sufficient basis for confidence in the lasting maintenance of desegregation, and thus that a genuine unitary system had not yet been implanted.

CONCLUSION

For all these reasons, we submit that the district court did not abuse its discretion in denying the motions of the Pasadena School Board. The record establishes an adequate basis for finding that the Board failed to demonstrate that it had attained and maintained a completely desegregated unitary system that promised to survive without the court's supervision. While the district court specified certain reasons sufficient for denying the relief sought, the Board's failure to meet its burden is reason enough to justify that court's decision. Accordingly, we urge this Court to affirm the decision of the court below.[30]

In the alternative, if this Court should conclude that the district court did not apply the proper criteria, or

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[30] The Board has suggested that this case may be moot (Br. 23-27). As to the individual respondents, it relies primarily on *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128 (1975). But regardless of the effect of that case on the status of the individual respondents, the Government's intervention pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, prevents this case from being moot. Under that section, the United States may intervene when "the Attorney General certifies that the case is of general public importance." Thus the Attorney General is authorized to intervene in an action to protect the continuing public interest as well as the interest of the private plaintiffs. The statute further provides that "the United States shall be entitled to the same relief as if it had instituted the action." The Board contends that the relief to which the Attorney General is entitled is limited by the proviso in 42 U.S.C. § 2000c-6 stating that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils . . . ." This Court, however, has twice construed that language neither to restrict the existing powers of the federal courts to enforce the Equal Protection Clause nor to withdraw from the courts their historic equitable remedial powers. *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 17-18; *McDaniel* v. *Barresi*, 402 U.S. 39, 41-42 (1971). Therefore the district court was entitled to accord to the United States whatever relief it would have granted the private plaintiffs. See, *e.g.*, *United States* v. *Watson Chapel School District No. 24*, 446 F.2d 933, 937-38 (8th Cir. 1971).

APPENDICES

APPENDIX A

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

Civil No. 1974

JAMES E. SWANN, et al.,
Plaintiffs,

—VS.—

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,
Defendants.

FINAL ORDER
(SWANN SONG)

On July 10, 1974, defendants filed a report covering certain changes in the proposed 1974-75 pupil assignment plan, and requested the court to dismiss the suit. On July 30, 1974, the court entered an order approving the revised plan under specified conditions, and expressing appreciation to the Board, the Citizens Advisory Group and the school staff people and others who had worked to make it possible. The order closed with the comment that, after May 1, 1975,

> ". . . assuming and believing that no action by the court will then be required, I look forward with pleasure to closing the suit as an active matter of litigation . . ."

Since early 1974, the case has been quiet. No new or old issues have been raised by the litigants or decided by the court. The new Board has taken a more

positive attitude toward desegregation and has at last openly supported affirmative action to cope with recurrent racial problems in pupil assignment. Though continuing problems remain, as hangovers from previous active discrimination, defendants are actively and intelligently addressing these problems without court intervention. It is time, in the tenor of the previous order, to be "closing the suit as an active matter of litigation . . ."

Dismissal is neither usual nor correct in a case like this where continuing injunctive or mandatory relief has been required. Facts and issues once decided on their merits ought, generally, to remain decided. This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed. The court does not anticipate any action by the defendants to justify a re-opening; does not anticipate any motion by plaintiffs to re-open; and does not intend lightly to grant any such motion if made. This order intends therefore to close the file; to leave the constitutional operation of of schools to the Board, which assumed that burden after the latest election; and to express again a deep appreciation to the Board members, community leaders, school administrators, teachers and parents who have made it possible to end this litigation.

The duty to comply with existing court orders respecting pupil assignment of course remains. So, also, does the duty to comply with constitutional and other legal requirements respecting other forms of racial discrimination.

Ghosts continue to walk. For example, some perennial critics here and elsewhere are interpreting Professor James Coleman's latest dicta in support of the notion that courts should abandon their duty to apply the law

in urban school segregation cases. Coleman is worried about "white flight," they say; school desegregation depends on Coleman; therefore the courts should bow out; "*cessante ratione, cessat ipsa lex,*" they say.

The local School Board members have not followed that siren. Perhaps it is because they realize that this court's orders, starting with the first order of April 23, 1969, are based, not upon the theories of statisticians, but upon the Constitution of the United States, and because they recall and are prepared to follow the law of this case which, as to Coleman, is contained in the order of August 3, 1970 (318 F.Supp. 786, 794, W.D.N.C. 1970), as follows:

> "*The duty to desegregate schools does not depend upon the Coleman report, nor on any particular racial proportion of students* [emphasis from original].—The essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that the segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. *Segregation would not become lawful, however, if all children scored equally on the tests.*" (Emphasis added.)

I do not anticipate a revival, in the Charlotte-Mecklenburg school system, of this and other questions which have already been exhaustively (and expensively) litigated and definitively answered.

With grateful appreciation to all who have made possible this court's graduation from *Swann*, it is therefore

ORDERED:

1. That this cause be removed from the active docket.
2. That the file be closed.

This 11 day of July, 1975.

/s/ James B. McMillan
JAMES B. McMILLAN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 68-1438-R

NANCY ANNE SPANGLER, et al.,
Plaintiffs,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

vs.

PASADENA CITY BOARD OF EDUCATION, et al.,
Defendants.

JUDGMENT, OPINION AND ORDER

Petitioner, Charles Johnson, the father of two school age children in attendance at the Pasadena Unified School District, has moved the court for an order to show cause why the respondent Pasadena City Board of Education (hereinafter Board)[1] should not be held in civil contempt for its failure to comply with the provisions of the order of this court concerning the desegregation of that school system in general and hiring of administrative personnel in particular. Accordingly, the moving party objects to the appointments of Willard A. Craft as Acting Assistant Superintendent of Elementary and Secondary Education, John F. McHale as Acting Assistant Superintendent for Personnel

[1] The Board is currently composed of Henry Marcheschi, President, Drs. Henry S. Myers, Jr. and Richard Vetterli, and Messrs. Wyman W. Newton and Samuel Sheats. This order to show cause is only directed to the first four Board members just enumerated since Mr. Sheats took no part in the activities which allegedly amount to contempt of this court's order.

and Supportive Service, Mrs. Anna Mary Hession as Acting Administrative Director of Elementary Curricumum, Ms. Louise Coover as Principal of Wilson Junior High School, and Dr. John Mike Kellner as Principal of the "Fundamental School." He requests this court to declare said appointments void *ab initio*, to order the respondents to institute hiring procedures in conformity with this court's original order of January 22, 1970 (hereinafter known as the Pasadena Plan), and to level such sanctions, including reasonable attorneys fees, as this court feels appropriate to punish the Board's failure to comply with the original hiring procedures set forth in the Pasadena Plan. *See, Spangler* v. *Pasadena City Board of Education* 311 F.Supp. 501 (C.D. Cal. 1970).

In connection with the hiring of Administrative personnel, the Pasadena Plan provides for "[a] positive recruitment program paralleling the teacher recruitment program [which] will actively seek out minority group administrators, supervisors, and counselors who are interested in employment with the Pasadena Unified School District." [2] Nevertheless, in contravention of these es-

[2] In its pertinent part, the Recruitment and Selection of Administrators Plan stipulated that ". . . bulletins concerning job opportunities will be sent to college and university placement offices and other professional organization offices. In these bulletins, minority candidates will be especially encouraged to apply . . .

"Vacancies in these positions are filled from eligible lists established by examination. At the present time the examination consists of an oral interview, evaluation of training and evaluation of experience by a committee appointed for this purpose. Announcements for these positions are distributed to all school personnel, to college and university placement offices in Southern California and to a mailing list recommended by the Department of Intergroup Education . . . . The announcement contains the title of the position, the minimum requirements for entrance, desirable qualifications, job duty statement and the salary . . .

"When vacancies occur, the top five names on the eligible list are referred to the appointing authority for consideration. All appointments must be approved by the Superintendent."

tablished procedures, the Board appointed Messrs. Craft and McHale, and Mrs. Hession on July 10, 1973 to their respective positions by a vote of three to two, with Messrs. Sheats and Marcheschi, and Superintendent Cortines, the non-voting Board member, dissenting in the face of the alleged illegality of the action. Thereafter, the Board appointed Dr. Kellner and Ms. Coover to their respective principalships; but, on the occasion of these latter two appointments, only Mr. Sheats dissented, with Mr. Marcheschi and Superintendent Cortines, relying on the advice which they had solicited from Los Angeles County Counsel, being then satisfied of the legality of the Board's actions.

It is beyond question that, if the Board had been acting upon permanent administrative appointments, such appointments would have been illegal in light of the Board's failure to advertise such positions, to submit ensuing applications to a committee for its evaluation and determination, to act upon recommendations stemming from that committee and from the Superintendent, and finally, to take affirmative steps to ensure minority applications for these positions. It is the Board's current contention relative to these appointments that their "temporary" nature precluded application of the normally prescribed appointment procedures and further justified the reliance of the Board upon the advice of Los Angeles County Counsel to the effect that said appointments were, in fact, legally within the purview of the Pasadena Plan. (*See*, Marcheschi Affidavit, p. 3)

The Standing of Petitioner

Initially, it is incumbent upon the court to determine whether the petitioner has the requisite standing to bring the instant order to show cause regarding civil contempt to the court's attention; for the petitioner is neither the named representative of the class of school

aged children affected by the original Pasadena Plan nor counsel of record for that class.

Relying on *Williams* v. *Iberville Parish School Board* 273 F.Supp. 542 (E.D.La. 1967), the defendants maintain that, where, as here, representation of the class is adequate and compatible with the interests of the entire class, no individual member of the class may appear *in propria persona* to vindicate an alleged violation of class rights. However, the court in *Williams*, *supra*, merely indicated that civil contempt proceedings may be instituted only by "parties primarily in interest" in the litigation or by parties who ". . . have in any way been damaged by the alleged disobedience of which they complain." *Id.* at 545. In addition, as the Ninth Circuit has pointed out in *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (1972), "broad power [has been] given to the district court to make various orders for the protection of a class. Fed.R.Civ.P. 23(d)." It appears axiomatic, therefore, that the father of two school age children, who is acting, in essence, as a guardian ad litem and whose children are affected by an order of this court, has a "primary interest" in ensuring that the orders of the court relative to his childrens' educational opportunities are dutifully enforced. As a parent, petitioner has standing and is permitted to make an appearance in this action to apprise the court of any non-compliance with said order.[3] (*Compare, Federal Trade Commission* v. *A. McLean & Son* 94 F.2d 802 (7th Cir. 1938) [where the court noted that "the protection of private rights" is cardinal to a civil contempt proceeding] *with McCrone* v. *U.S.A.* 307 U.S. 61,

[3] For the record it should be noted that the plaintiff-representatives of the class joined the petitioner's motion to hold respondents in civil contempt of this court's 1970 ruling. Thus, even if the petitioner were deemed to have insufficient standing to prosecute this contempt proceeding, the court could nonetheless consider the matter in light of the plaintiff's participation herein.

63 n.4 (1939); *See also* Kaplan, *1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 *Harv. L.Rev.* 356, 392 n.137 (1967); Practicing Law Institute, *Class Actions* at p. 178 (1973).

The Violation

Turning then to the merits of the case, the court notes that the Pasadena Plan, relative to the filling of administrative positions, embraced a ". . . total of 133 non-teaching certified assignments [which] include *all* school administrators, directors, supervisors, consultants, counselors, school psychologists and others . . ." (emphasis supplied). The administrative posts, which the respondents summarily filled in alleged violation of the broad mandates of the Pasadena Plan and which form the focal point of the instant inquiry, clearly fall within the parameters of the court's directives concerning the hiring of administrative personnel. Yet the Board, mainly through the protestations of its President, Mr. Marcheschi, indicates that "none of the past or present Board members, with one exception, [*i.e.*, Mr. Sheats,] has ever suggested that the Board was required to follow the procedures set forth in the Recruitment and Selection of Administrators Section of the Pasadena Plan when making or approving temporary appointments of persons to acting administrative positions or permanent appointments of persons reporting directly to the Superintendent." (Marcheschi Affidavit, p. 2). In essence, then, it is the Board's position that its lack of intent in failing to comply with the court's order, coupled with its reliance on the advice of counsel and the insufficiency of the evidence necessary to prove a violation, precludes the possibility of a contempt citation in the instant matter.

In general, the lack of malicious intent or the presence of a good faith belief in the rectitude of one's

position cannot serve to "sterilize conduct otherwise contemptuous." *Babee-Tenda Corp.* v. *Schorco Manufacturing Co.* 156 F.Supp. 582, 584 (S.D.N.Y. 1957); *See also, Land* v. *Dollar* 190 F.2d 623 (D.C. Cir. 1951), *cert. dism. per mot of petitioner* 344 U.S. 806 (1952); *Sucrs. De A Mayal & Co.* v. *Mitchell* 280 F.2d 477 (1st Cir. 1960), *cert. den.* 364 U.S. 902; *Falk* v. *Standard Business Forms, Inc.*, 270 F.Supp. 147 (D.C.N.C. 1967); *Rosentiel* v. *Rosentiel* 278 F.Supp. 794 (D.C.N.Y. 1967); *Landman* v. *Landman* 354 F.Supp. 1292 (D.C.Va. 1973). Likewise, the Board's reliance on the advice of the Los Angeles County Counsel, who in a rather cryptically worded letter dated July 31, 1973 erroneously concluded that the Board's appointments did no offense to the Pasadena Plan, may not serve to immunize the Board from acts which are contemptuous in and of themselves.[4] *Land* v. *Dollar, supra; U.S.* v. *Seavers* 472 F.2d 607 (6th Cir. 1973); *Heyman* v. *Kline* 344 F.Supp. 1088 (D.C.Conn. 1970), *aff'd in part and rev'd. in part* 456 F.2d 123 (2d Cir. 1972), *cert. den.* 409 U.S. 847 (1972); *Theriault* v. *Carlson* 353 F. Supp. 1061 (D.C.

[4] The Board seems to have taken further, albeit unwarranted, comfort in the assurances proferred by the Department of Health, Education and Welfare that federal funding would continue to flow to the Pasadena schools if the Board honored certain commitments to H.E.W. concerning the continued desegregation of the school system. The Board's agreement with H.E.W. differs from the provisions set forth in the Pasadena Plan in a number of instances, most of which concern the mailing lists to be obtained from the Department of Intergroup Education, the "minimum" as opposed to the "main" requirements under the plan; the elimination of the need to "positively seek out" minority employees, and the number of individuals who are to sit on the administrative review board. It should go without saying that neither H.E.W.'s understanding of this court's orders, nor its representations to the Board in regard thereto, can serve to permit the Board to act with impunity in contravention of those orders. Neither the Pasadena City School Board nor the Department of Health, Education and Welfare are the final arbiters of the intendment of this court's orders.

Ga. 1973); *U.S.* v. *Wefers* 314 F.Supp. 137 (D.C.N.H. 1970) *vacated* 435 F.2d 826 (1st Cir. 1970). It should be noted, however, that both the presence of a bona fide belief in the rectitude of one's actions and the reliance upon the advice of counsel may operate to mitigate the severity of the contempt sanction. *U.S.* v. *Johnson* 52 F.Supp. 382 (N.D.N.Y. 1943).

Yet, the Board's effort to circumvent the thrust of the Pasadena Plan by making "temporary" appointments which, under their stated terms, conceivably could have been renewed on a yearly basis, actually operates as a two-pronged assault upon the Board's present position; for not only does this conduct comprise acts in contempt of this court's order but also, in light of a majority of the Board's expressed opposition to the Pasadena Plan, appears to preclude any element of good faith in connection with it. *See, Spangler* v. *Pasadena City Board of Education* —— F.Supp. —— (C.D.Cal. 1974). Thus, under the guise of making "temporary" administrative appointments of a continuing nature, the Board could "permanently" frustrate the aims of the Plan relative to the hiring of minority administrators. Constitutionally, this court cannot and will not abide the transparency of such an action.

The Board maintains, however, that the evidence adduced by the petitioner is not of a "clear and convincing" nature and is incapable, therefore, of supporting a civil contempt citation. While it is generally believed that the burden of proof necessary to support a claimed civil contempt citation must be of a "clear and convincing" nature, [*Washington* v. *Central of Georgia Ry. Co.* 174 F.Supp. 33 (M.D.Ga. 1958), *aff'd. sub. nom. Marshall* v. *Central of Georgia Ry. Co.* 268 F.2d 445 (5th Cir. 1959), *cert. den.* 361 U.S. 943 (1959); *Hart Schaffner & Marx* v. *Alevander's Dept. Stores, Inc.*, 341 F.2d 101 (2d Cir. 1965); *Stringfellow* v. *Haines*, 309 F.2d

910 (2d Cir. 1962); *N.L.R.B.* v. *Alamo Express, Inc.*, 395 F.2d 481 (5th Cir. 1968); *American Optical Co.*, v. *Rayex Corp.* 291 F.Supp. 502 (S.D.N.Y. 1967), *aff'd.* 394 F.2d 155 (2d Cir. 1968), *cert. den.* 393 U.S. 835 (1968); *Rosentiel* v. *Rosentiel, supra; Benner* v. *Philadelphia Musical Soc., Local 77*, of the *American Federation of Musicians* 233 F.Supp. 108 (E.D.Pa. 1964)], the evidence adduced in the course of the instant hearing was uncontroverted to the effect that the acts of which the petitioner currently complains actually occurred. Since the Board admits to having made the appointments now under scrutiny and since the defenses asserted by the Board can avail it little, there only remains for the court to appraise the legal effect of the appointments in light of the concepts envisioned in the Pasadena Plan.

Proposal to Purge

Notwithstanding all the foregoing, the Board informs the court—and quite rightly—that the purpose of a civil contempt proceeding is actually to secure compliance with a lawful court order and not to punish its initial violation. *Gompers* v. *Buck's Stove & Range Co.* 221 U.S. 418 (1911); *Brotherhood of Locomotive Firemen & Engineermen* v. *Bangor & A. R. R.* 380 F.2d 570, 581 (D.C. Cir. 1967), *cert. den.*, 389 U.S. 327 (1967); *De Parq* v. *U. S. District Court* 235 F.2d 692 (8th Cir. 1956); *N.L.R.B.* v. *Rath Packing Co.* 130 F.2d 540 (8th Cir. 1942). Accordingly, the Board reasons that its instructions to the Superintendent on May 7, 1974 to forthwith bring the school district relative to the disputed administrative appointments into full compliance with the provisions of the Pasadena Plan, coupled with the actual advertising of these positions as specified by the Plan, serve to purge the contempt of this court's order, if any contempt there were. Yet, it was not merely the Board's failure to advertise the administrative positions under scrutiny which comprises its contemptuous

behavior but rather its *making* of the appointments, *absent* the procedures specified in the Plan.[5] Thus, the purportedly purgative actions of the Board—unaccompanied, as they are, by a vacating of the unlawful appointments—really are tantamount to nothing more than a *proposal* to purge the contempt and, as such, do not serve as an effective defense to the Board's initial (and continuing) contempt of the court's order as enunciated in the Pasadena Plan.

The Purgation

As the preceding analysis readily reveals, this court has determined that the Pasadena City Board of Education is in contempt of the mandates of the Pasadena Plan.[6] As a consequence, the Board shall within 5 days of the filing of this opinion vacate the disputed appointments and otherwise bring itself into conformity with the Pasadena Plan as more fully specified herein or, in lieu thereof, to pay $500.00 per day until such time as the Board complies with the orders of this court as they relate to the hiring of administrative personnel.

Petitioner has, by his actions herein, brought to the attention of the court what could conceivably be a hiatus in the administrative functions of the Pasadena Unified School District. Since no suggestion for modification has been forthcoming from the Board to obviate any future misunderstanding as to the parameters of the Pasadena Plan as it pertains to "temporary" or "acting" appointments of all administrative vacancies, the Pasadena Plan is now modified by the Court in the following respects:

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[5] Once again acting upon the advice of the Los Angeles County Counsel, the Board did not vacate the illegal appointments in question since it felt that an initiation of the prescribed procedures was all that was minimally required to purge the contempt.

[6] *See*, n.1, *supra*.

Modifications in Procedures for the Selection of Temporary Administrative Personnel

1. All administrative vacancies may be filled by temporary appointment by the Superintendent of Schools, but such appointments shall terminate 30 days subsequent thereto unless such appointment shall be extended for 30 additional days by action of the Pasadena City Board of Education. After this time, position shall be filled according to the Personnel Selection Procedure enunciated in the Pasadena Plan.

2. All such "acting" or "temporary" administrative appointments shall be approved by a majority of an Administrative Appointments Board, comprised of 3 members selected by a vote at large of the entire faculty and administration of the Pasadena Unified School District and one member appointed by the Superintendent of Schools of the Pasadena Unified School District and one member appointed by a majority of the members of the Pasadena City Board of Education.

3. Notwithstanding the provisions of paragraph 2 of this Section, any extension of the 30 day termination period relative to temporary or acting administrative personnel, attempted to be undertaken by the Pasadena City Board of Education, shall be approved by the Administrative Appointments Board in order to be effective.

4. Under the guidelines set forth in this Section, no temporary or acting administrative personnel may serve in that capacity for more than 60 days except upon unanimous concurrence of the Administrative Appointments Board which shall in no event be given for a period to exceed an additional 90 days.

5. The district maintains a policy of no discrimination in employment because of race, creed, color, age, sex, marital status, national origin or political beliefs.

Attorney's Fees and Conclusion

While it is true that the petitioner has performed a valuable public service by calling the Board's peccadilloes to the attention of this court, it does not seem equitable that he, as an attorney at law impregnated with the public trust, should receive payment for his vindication of both a private and a public right. His actions comport with the highest mandates of the legal profession, and he should, therefore, take solace in the knowledge that he has contributed to the continuation of equal educational opportunities in Pasadena.

Except as to attorney fees, the petitioner's motion is hereby granted.

DATED: August 12, 1974

/s/ Manuel L. Real
MANUEL L. REAL
United States District Judge